

**Maximus Supply Corp. v M. Hiller & Sons, Inc.**

2018 NY Slip Op 32912(U)

November 13, 2018

Supreme Court, Kings County

Docket Number: 504930/15

Judge: Loren Baily-Schiffman

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 13<sup>th</sup> day of November, 2018.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

MAXIMUS SUPPLY CORP.,  
Plaintiff

- against -

M. HILLER & SONS, INC.,

F & T MECHANICAL, INC.,

MEGA CONTRACTING and  
LIBERTY MUTUAL INSURANCE COMPANY  
Defendants.

Index No.: 504930/15

Motion Seq. # 4 and #5

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion	3
Plaintiff's Reply Affirmation, Affidavit and Exhibits	4

Upon the foregoing papers Defendants, M. Hiller & Sons, Inc. ("Hiller"), Mega Contracting Company ("Mega"), and Liberty Mutual Insurance Company ("Liberty"), move this Court for an Order pursuant to CPLR § 3212 and Lien Law §11-b, granting summary judgment dismissing the complaint. Additionally, Defendants Hiller, Mega and Liberty ("Mov ants") move this Court for an Order cancelling or vacating Plaintiff Maximus Supply Corporation's ("Maximus") notice under Mechanic's Lien Law and the surety bond that Mega took, as principal with Defendant Liberty. Finally, Defendant Hiller moves this Court for an Order pursuant to CPLR § 3212 and Lien Law §19(6) granting summary judgment dismissing the complaint. Plaintiff Maximus cross-moves to amend the complaint to add an additional cause of action against Defendant Hiller for unjust

enrichment.

### **Background**

This is a foreclosure action brought pursuant to a mechanic's lien on 1133 Manhattan Avenue, Brooklyn, New York (Block: 2482, Lot: 26). On or about August 14, 2014, Defendant, F & T Mechanical Inc. ("F & T"), promised to pay Plaintiff Maximus the sum \$112,430.00 pursuant to various purchase orders. Plaintiff delivered all the goods and merchandise to the subject property between August 14, 2014 and February 4, 2015. Defendant, F & T, never paid the \$112,430.00 for the goods and merchandise received, as set forth above. On March 2, 2015 Plaintiff filed a Notice of Mechanic's Lien against F & T in the Kings County Clerk's Office. Plaintiff served copies of the lien upon F & T and Heller, the owner of the property. However, it is undisputed that Plaintiff failed to serve a Notice of Mechanics Lien upon Mega.

Lien Law §11-b required Maximus to serve the Notice of the Mechanic's Lien by certified mail on Mega, the general contractor. Furthermore, "[failure] to file proof of such a service with the county clerk within thirty-five days after the lien is filed shall terminate the notice as a lien." Lien Law §11-b. Defendants contend that the lien is void and unenforceable since Maximus never served a copy of its lien upon Mega. Maximus argues that the notice requirement of Lien Law §11-b was substantially complied with and its failure to serve a copy of the lien on Mega was a de minimis deviation. Specifically, Maximus contends that Mega had actual knowledge of the lien, as Maximus' President, Gary Stern, had a conversation with the operations manager of Mega and another conversation with the controller of Mega, where Stern informed them that the Notice of Mechanics Lien had been filed. Additionally, within thirty-five (35) days of the filing of Notice

of Mechanics Lien, Mega procured a surety bond which on its face refers to the filing of the lien in question. Finally, Plaintiff argues that public policy favors the enforcement of mechanic's liens. Therefore, Plaintiff cautions against narrowly applying Lien Law §11-b.

### Discussion

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. *CPLR 3212[b]; Gilbert Frank Corp.v Federal Ins. Co., 70 NY2d 966, 967 (1988); Zuckerman v City of New York, 49 NY2d 557, 562 (1980)*. On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought *Spinelli v Procassini, 258 AD2d 577 (2<sup>nd</sup> Dept. 1999); Tassone v Johannemann, 232 AD2d 627, 628 (2<sup>nd</sup> Dept. 1996); Weiss v Garfield, 21 AD2d 156, 158 (3<sup>rd</sup> Dept. 1964)*. Under Lien Law 11-b:

A lienor having a direct contractual relationship with a subcontractor or a sub-subcontractor but not with a contractor shall also serve a copy of such notice or amendment by certified mail to the contractor. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien.

Additionally, while "in cases where actual notice was not conceded, there are precedents to the effect that strict compliance with the letter of a provision [in the Lien Law] is not required," although statutes in derogation of common law implicate strict compliance principles. *Matter of Am. Honda Fin. Corp. v One 2008 Honda Pilot, 24 Misc. 3d 745, 750, (Sup. Ct., New York County 2009)*. Mechanics' liens are created by statute and therefore require strict compliance. *Umbaugh Builders. Inc., v Parr Co. Of Suffolk, Inc., 86 Misc.2d 1036, 1037 (Sup. Ct., Suffolk County 1976)*.

Moreover, the certified mail notice requirement is a critical element of the statute. *Bruno Frustaci Contracting, Inc. v Georgie Enterprises LLC*, 6 Misc. 3d 1021(A) (Sup. Ct., Kings County 2005). Failure to comply with the certified mail requirement is, therefore, not a de minimis deviation.

Here, Plaintiff's argument of substantial compliance and liberal construction of Lien Law § 11-b does not mitigate its failure to serve the Notice of the Mechanic's Lien on Mega, the contractor. Accepting Maximus' version of the facts as true and according it every possible inference, compliance with the statute was not met. Therefore, Defendants' motion for an order granting summary judgment and canceling the Notice of Lien is granted.

Turning to Plaintiff's motion to amend the complaint, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleadings." *CPLR 3025(b)*. Here, Plaintiff failed to submit a proposed amended complaint. Therefore, the motion to amend is denied with leave to renew upon proper papers.

Accordingly, it is:

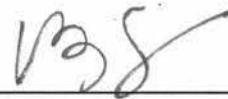
ORDERED that Mov ants' motion for summary judgment is granted in its entirety, dismissing the complaint, and it is

ORDERED that the Mechanics Lien filed against the property located at 133 Manhattan Avenue, Brooklyn, New York (Block: 2482, Lot: 26) is hereby vacated, and it is

ORDERED that Plaintiff's motion is denied in its entirety without prejudice to renew.

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FILED

ENTER,



LOREN BAILY-SCHIFFMAN

JSC

**LOREN BAILY-SCHIFFMAN**